



AUG 22 1996

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Rulemaking to Amend Parts 1, 2, 21, and 25)	CC Docket No. 92-297
of the Commission's rules to Redesignate)	
the 27.5-29.5 GHz Frequency Band, to)	
Reallocate the 29.5-30.0 GHz Frequency)	
Band, to Establish Rules and Policies for)	
Local Multipoint Distribution Service and)	
for Fixed Satellite Services)	

To: The Commission

**REPLY COMMENTS OF THE CHIEF COUNSEL
FOR ADVOCACY OF THE UNITED STATES
SMALL BUSINESS ADMINISTRATION**

SUMMARY

The Office of Advocacy hereby submits its Reply Comments in response to the First Report and Order and Fourth Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding. The Office of Advocacy opposes that part of the proposed rule that would reallocate the 31.0-31.3 GHz band exclusively to Local Multipoint Distribution Service (LMDS) on a primary basis. The Notice fails to consider the impact such a reallocation would have on existing users of this spectrum, which are largely small governmental entities and small businesses. The Office of Advocacy urges the Commission to respond favorably to comments that suggest the possibility of a negotiated settlement regarding the shared use of

this spectrum. The Commission should assist all parties in developing a negotiated settlement that would accommodate all users and effect the overall purposes of this docket.

I. THE COMMISSION SHOULD NOT SIMPLY DISPLACE INCUMBENT LICENSEES OF THE 31.0-31.3 GHz BAND BUT SHOULD ACCEPT NEGOTIATED PROPOSALS FOR SHARED USE OF THE SPECTRUM

The Notice proposes a reallocation of the 31.0-31.3 GHz band from current users to LMDS use.¹ While the need for additional spectrum for LMDS is clear given the outcome of the negotiated settlement between the various parties competing to use the 28 GHz band, it is not necessary for the purposes of the Commission's rulemaking that incumbent licensees in the 31.0-31.3 GHz band be simply displaced from their current uses.

The Notice and the IRFA make it clear that the incumbent licensees in the 31.0-31.3 GHz band operate on a non interference basis. The Notice also asserts that, according to the Commission's rules, such licensees have no rights to protection from interference from other licensees. It is certainly true, however, that the Commission's rules do not require the Commission to displace such licensees. In such instances, regardless of the status of the licensees' rights, the Commission has traditionally attempted to develop a shared use plan that would accommodate all parties' spectrum needs. This has been the case in this very docket

¹Notice at ¶¶ 95-104.

between another set of competing interests in another band of spectrum.²

The Office of Advocacy understands from conversations with the commenters to this proceeding that Sierra Digital Communications has been in negotiations with the LMDS manufacturers and licensees and will be proposing a shared use plan to the Commission. The Office of Advocacy specifically supports the tentative proposal suggested by Sierra Digital Communications in discussions with this office (which is expected to be submitted by Sierra in comments to the Commission). While all parties are not yet in final agreement, this process holds the prospect of accommodating all parties' interests while at the same time accomplishing the policy goals of the Commission in this docket.

**II. THE NOTICE'S INITIAL REGULATORY FLEXIBILITY ANALYSIS
UNDERESTIMATES THE NUMBER OF AFFECTED ENTITIES AND FAILS
TO CONSIDER SIGNIFICANT ALTERNATIVES TO DISPLACING
INCUMBENT LICENSEES IN THE 31.0-31.3 GHz BAND.**

**A. The IRFA Underestimates the Number of Small Entities that Would be
Affected by Reallocation of to 31.0-31.3 GHz Band.**

Section IV of the Notice's IRFA sets forth a description and estimate of the number of

²It is interesting to note that one of those sets of parties, the potential LMDS operators had no greater rights to the bandwidth in question than do the 31.0-31.3 GHz incumbents.

small entities to which the proposed rule will apply.³ It estimates the number of small incumbent licensees at "25 or 26".⁴ It is this Office's understanding that this number understates the number of entities affected by the reallocation of this spectrum. The comments submitted by Sunnyvale GDI, Inc. indicate that there are in excess of forty incumbent local governments that hold licenses in this band.⁵ A manufacturer of the equipment used by the incumbent licensees further estimates that there are as many as a hundred incumbent licensees -- both public and private -- in this band.⁶ The rule will also have an impact on the manufacturers of the relevant equipment and their resellers.⁷ Furthermore, the number of small governmental entities that are licensees of this technology is expected to grow significantly given that the traffic control technology marketed by Sunnyvale GDI has only recently come to market.

B. The IRFA Fails to Consider Significant Alternatives as Required by the Regulatory Flexibility Act.

³Notice at pp. 74-5.

⁴*Id.* at 75.

⁵Comments of Sunnyvale GDI, Inc. at attachments.

⁶Telephone conversation with Hal Tenney, President, Sierra Digital Communications, Inc., August 22, 1996.

⁷The manufacturers of equipment used in the 31.0-31.3 GHz band include Sierra Digital Communications, Inc. and Westech, Inc, both apparently small businesses. There are also over a dozen marketers/resellers of this equipment virtually all of whom appear to be small businesses (see attached list from Sierra Digital Communications).

The IRFA considers few, if any significant alternatives to reallocating the entire 31.0-31.3 GHz band to LMDS use. The IRFA considers an alternative to placing LMDS operators in the 31.0-31.3 GHz band. It does not suggest any alternatives for the incumbent licensees in that band.

The Notice and the IRFA make it clear that the incumbent licensees operate on a non interference basis. It is also clear that, according to the Commission's rules, such licensees have no rights to protection from interference from other licensees. Stating this fact does not, however, relieve the Commission of its duty to consider significant alternatives to its rule under the Regulatory Flexibility Act. The Regulatory Flexibility Act requires agencies to "find significant alternatives to minimize the impact on small entities".⁸ All the IRFA has done is to state the effect of the existing rules.

C. A Shared-Use Plan for the 31.0-31.3 GHz Band Would Meet the Requirements of the Regulatory Flexibility Act of 1980.

As mentioned above, the Office of Advocacy understands that several of the commenters are in the process of developing an alternative that would both minimize the economic impact of the proposed rule and achieve the goals of the Commission's proposed rule. By embracing such an alternative, the Commission would meet its obligations under the

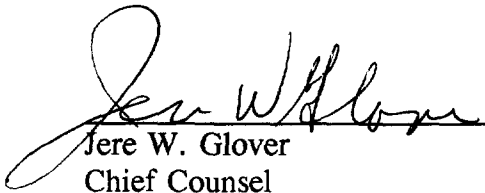
⁸The Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (1980), § 603(c), 5 U.S.C. § 601, et seq., § 603(c)

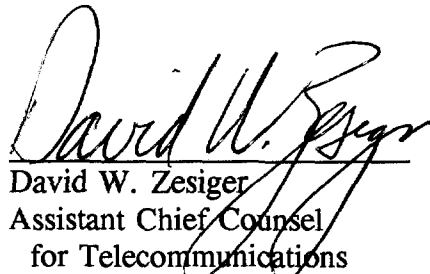
Regulatory Flexibility Act to take "steps ... to minimize the significant economic impact on small entities" of its rule.⁹ The Office of Advocacy strongly urges the Commission to explore this alternative and incorporate the results of such negotiations in its final report and order. To the extent the Commission can assist the parties in arriving at a mutually agreeable outcome, it should lend its weight and authority to such a process as well.

CONCLUSION

The Office of Advocacy believes that the Commission should not allocate the entire 31.0-31.3 GHz band exclusively to LMDS use as proposed in the Notice. It should instead encourage and assist the parties to arrive at a mutually agreeable settlement that would meet the Commission's objectives in the this proceeding.

Respectfully submitted,


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⁹*Id.* at § 604(a)(5).

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